Thus, the cost of using MESBIC financing is usually the sacrifice of 100% integration credit. That generally means loss of the comparative hearing, since integration credit is so critical to the proposals of most applicants. 1965 Policy Statement, 1 FCC2d 393, 395 (1965). The result is that minority applicants are effectively deprived of financing from the very entities created to help them. See Storer Broadcasting Company, 70 FCC2d 709 (1979).

This can be remedied by a simple policy clarification stating that in light of the importance of MESBICs to minority ownership, their noncontrolling interests will not be attributed to an applicant. Inasmuch as this clarification would be limited to SBA-qualifying MESBICs, it would in no way undercut the Commission's multiple ownership rules. Instead, by facilitating the financing of minority broadcast ventures, the clarification would foster the diversification goal underlying the multiple ownership rules. See FCC v. NCCB, 436 U.S. 775, 796 (1978).

3. EXPANSION AND REVISION OF THE BROADCAST EXPERIENCE CREDIT

The Commission should expand the broadcast experience credit to include any comparable management, administrative or entrepreneurial experience transferable to broadcast station ownership.

For example, credit should be given for those with a background in sales or marketing in a business which trades heavily with broadcasting; to a broadcast production company executive; to those in community or civil rights organizations who use the media frequently; and to executives of communications businesses subject to FCC or state regulation, such as cellular radio or common carriers subject to FCC or state regulation.

Only slight credit is given for broadcast experience because it can be learned on the job and "could discourage qualified newcomers to broadcasting." 1965 Policy Statement, supra, 1 FCC2d at 396. Indeed, the historically low representation of minorities in broadcast employment usually renders the broadcast experience credit a regressive, diversity suppressing factor in comparative hearings.

The effect of this expansion of the credit would more realistically reflect the types of past employment which translate into successful media ownership. This proposal would recognize that past experience in the media has never been a prerequisite to ownership. Indeed, none of the great broadcast pioneers, including Sarnoff and Paley, had broadcast experience; yet many of them did quite well in the business.3/

3/ See Editorial, "No Industry Experience Required," Electronic Media, August 6, 1990, at 12 (favorably commenting on the selection of CEOs for CNN, CNBC, Group W Television, ABC Radio Networks and NBC News -- none of whom had any previous broadcast experience).

It is simply irrational to give broadcast experience credit to a former radio station disc jockey announcer when giving none to a newspaper editor or to the sales manager of an automobile dealership who interacts daily with broadcast sales departments.

The range of occupations for which credit should be given need not be identified with precision at the outset. The comparative hearing process already has the flexibility to accommodate even entirely new credits and preferences. 1965 Policy Statement, supra, 1 FCC2d at 399.

Expansion of the broadcast experience credit in this manner would also be expected to attract a larger number of sophisticated and economically successful minority business executives into broadcasting.[4/] Such individuals, who may have been discouraged early in life from pursuing a broadcast career owing to rampant discrimination in the industry, may have become quite successful in other occupations whose skills are readily transferrable to broadcasting.

This type of sophisticated minority applicant is unlikely to have any tolerance for sham proposals. Thus, a beneficial side effect of this proposal is that it would provide an incentive for the filing of genuine as opposed to sham applications.

4/ Although this proposal would tend to benefit minorities, it is race neutral, and is just as logical as applied to nonminorities as it is to minorities. Race-neutral minority entrepreneurship proposals are rare, but highly desirable. J.A. Croson Company v. City of Richmond, 488 U.S 469 (1989). The Commission has not hesitated to adopt race-neutral improvements in its policies while considering their impact on minority entrepreneurship. See, eg., New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants, 87 FCC2d 200, 201 (1981) (modifying the financial qualifications requirement of one year of operating capital in Ultravision Broadcasting Company, 1 FCC2d 544 (1965), and substituting a more realistic three month requirement.)

Finally, the Commission should take this opportunity to reverse its 1985 holding that a nonminority applicant's broadcast experience may be considered even when "it occurred at a time when discrimination made it virtually impossible for a minority group member to acquire any comparable experience." Radio Jonesboro, Inc., 100 FCC2d 941, 946 n. 13 (1985) (subsequent history omitted) (crediting nonminority applicant's experience as a radio announcer in Arkansas in the 1950s: the applicant prevailed over a minority applicant). Credit for employment obtained at a time when whites did not have to compete with minorities for broadcasting jobs only reinforces and manifests the present effects of past discrimination. The Radio Jonesboro holding, if not unlawful on its face,[5/] offends public policy and should be reversed.

4. REVISED MINORITY SENSITIVITY CREDIT

The Commission should revise the "minority sensitivity" credit derived from TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), rehearing denied en banc, 495 F.2d 941 (1974) (supplemental opinion) to provide that such a credit would be applicable to any proceeding and would not be available only for the purpose of offsetting another applicant's minority ownership credit.

5/ See Columbus Board of Education v. Denick, 443 U.S. 449, 458-59 (1979) (14th amendment requires abandonment of policies which reinforce the present effects of past discrimination).

This policy correction would reverse Colonial Communications, Inc., 5 FCC Rcd 1967, 1970 n. 5 (Rev. Bd. 1990) (holding that the minority sensitivity credit was only intended to be used against minorities.) The effect of the policy correction would be to encourage the licensing of minority-sensitive broadcasters even in proceedings where no minorities applied. Such applicants could be expected to be more likely than other nonminority applicants to hire and train minorities, and ultimately perhaps to sell their stations to minorities. Thus, "the benefits redound to all members of the viewing and listening audience." Metro Broadcasting, Inc. v. FCC, 109 S.Ct. 2997, 3011 (1990) ("Metro").

Those seeking a minority sensitivity credit would continue to be held to a high burden of persuasion. In addition, the triggering test should be modified somewhat to focus on demonstrated past activities in broadcasting and civic activities, as opposed to mere promises of future minority-oriented activities.6/

6/ See Chase Communications Co., 100 FCC2d 689, 692-93 (Rev. Bd. 1985) and San Joaquin TV Improvement Corp., 96 FCC2d 594, 600-603 (Rev. Bd. 1983) (considering promises of future minority sensitivity along with evidence of past minority sensitivity.) Allowing comparative credit for such easy-to-promise items as a minority advisory committee should be held to be contrary to the Commission's now well established policy that programming promises are seldom credited in comparative hearings. See Suburbanaire, Inc., 104 FCC2d 909, 917-19 (Rev. Bd. 1986) (noting that program format changes may and do take place at the broadcaster's whim).

5. COMPARATIVE HEARING PREFERENCE FOR SALE OF STATION TO MINORITIES

The Commission should provide applicants with a comparative hearing preference if they divest an FM or VHF TV station to minorities for no more than 75% of fair market value within one year after earning a permit. The station to be divested would not need to be the one sought in the hearing.

The preference would be available whether or not minorities are also applicants in the hearing, since the general public would receive the intended benefits regardless of which other applicants are in the hearing. See Metro, supra, 109 S.Ct. at 3011.

The weight of this preference would be "moderate" -- roughly equal to the present weight afforded to female ownership. The reason for having this preference count less than the weight afforded for minority ownership is that minority ownership through licensing is preferable to future minority ownership through purchase. Thus, one proposing this type of preference would not prevail against a comparable minority applicant in the same hearing.

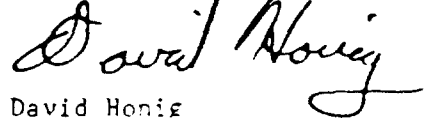
To implement this provision, insure its effectuation, and prevent abuse, the divestiture commitment should be made a condition of the applicant's license. The condition could not be removed simply because the comparative hearing has been settled. See NPRM, supra, 5 FCC Rcd at 4052 (proposing to reverse Ruarch Associates, 103 FCC2d 1178 (1986)).

This policy would serve two important needs. First, it would provide a new vehicle by which nonminorities could help foster minority ownership. See Metro, supra; 1982 Policy Statement, supra, 92 FCC2d at 855; 1978 Policy Statement, supra, 68 FCC2d at 983. At the same time, this approach would broaden the number of applicants whose licensing would result in the ascendancy into the ownership ranks of a minority.

CONCLUSION

For the foregoing reasons, the Civil Rights Organizations respectfully request the Commission to approve these proposals and incorporate them in the resolution of this proceeding.

Respectfully submitted,



David Honig
1800 N.W. 187th Street
Miami, Florida 33056
(305) 628-3600

Dennis Courtland Hayes
General Counsel
Brian Carter
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9307

Eduardo Pena
1101 14th Street N.W.
Suite 610
Washington, D.C. 20005
(202) 371-1555

Robert L. Thompson
Pepper & Corazzini
1776 K Street N.W.
Washington, D.C. 20006
(202) 296-0600

Counsel for the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition, and the National Black Media Coalition

Of Counsel:

Steven B. Royster
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 857-8972

September 14, 1990